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nace Corporation and another. There was judgment against the furnace corporation, and it brings error. Affirmed.

W. S. Poage and *W. B. Kegley,* for plaintiff in error.
A. A. Phlegar and *Oglesby & Harris,* for defendant in error.

TAYLOR *v.* HEDRICK et al.

Nov. 18, 1909.

[66 S. E. 65.]

Judgment (§ 715*)—Res Judicata.—A degree determining that title under a deed by which one of several joint tenants had divested himself of all interest in favor of his co-tenants was not an issue under the pleadings, in their suit against him to quiet title on the sole ground of their adverse possession, and dismissing the suit, is not res judicata as to the title so as to bar their right to rely on the deed as a defense to his subsequent suit for partition.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1244-1247; Dec. Dig. § 715.* 6 Va.-W. Va. Enc. Dig. 348.]

Appeal from Circuit Court, Rockingham County.

Suit by James E. Taylor against George W. Hedrick and others. From a decree for defendants, plaintiff appeals. Affirmed.

D. O. Dechert and *Roller & Martz,* for appellant.
Jno. E. Roller and *Conrad & Conrad,* for appellees.

HURRICANE LUMBER Co. et al. v. LOWE.

Nov. 18, 1909.

[66 S. E. 66.]

1. Frauds, Statute of (§ 72*)—Contracts—Sale of Standing Timber.—A contract for the sale of standing timber in the seller's possession which contemplates the immediate severance of the trees from the land converts them into personalty, and takes the sale out of the statute of frauds, requiring the sale of an interest in land to be in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 117; Dec. Dig. § 72.* 6 Va.-W. Va. Enc. Dig. 524.]

2. Appeal and Error (§ 1050*)—Harmless Error.—Though, in an action for the value of trees sold to defendants and cut and removed by them, it was agreed by the parties that plaintiff claimed under one H., the admission in evidence of a deed from one K., if error, was harmless; it sufficing for plaintiff to show possession.

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*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.* 1 Va.-W. Va. Enc. Dig. 592.]

3. Appeal and Error (§ 1050*)—Harmless Error.—A judgment otherwise proper should not be reversed for harmless error in the admission of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.* 1 Va.-W. Va. Enc. Dig. 592.]

4. Pleading (§ 380*)—Pleading to Sustain.—Evidence as to facts not stated under the grounds of defense filed by defendant is properly excluded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1237-1252; Dec. Dig. § 380.* 5 Va.-W. Va. Enc. Dig. 299.]

5. Pleading (§ 258*)—Amendments During Trial—Plea.—While application during the trial to amend the statement of grounds of defense is addressed to the sound discretion of the court, the refusal of such an amendment was proper where the fact sought to be introduced, if it existed, must have been known to defendants from the beginning, and was omitted through their own fault.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 765-782; Dec. Dig. § 258.* 1 Va.-W. Va. Enc. Dig. 318.]

6. Logs and Logging (§ 3*)—Sale of Standing Timber.—That a prior deed from plaintiff to a third party of the unmerchantable timber on the land was erroneously recorded as conveying the merchantable timber was no defense to an action to recover for merchantable timber subsequently sold defendants.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.* 13 Va.-W. Va. Enc. Dig. 219.]

Error to Circuit Court, Buchanan County.

Action by H. L. Lowe against the Hurricane Lumber Company and another. Judgment for plaintiff, and defendants bring error. Affirmed.

O. M. Litz and *Greever & Gillespie,* for plaintiffs in error.

Ayers & Smithdeal and *Routh & Routh,* for defendant in error.

McCOMB *v.* GILKESON et al.

Nov. 18, 1909.

[66 S. E. 77.]

1. Vendor and Purchaser (§ 65*)—Contracts of Hazard—Sale in Gross or by the Acre—Presumption.—As equity does not favor contracts of hazard, a sale is by the acre, where the quantity is referred to, and the language does not plainly indicate a sale in gross.

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*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.